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No. 955

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSEPH LLOYD THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, Jr.,
Assistant Attorney General,
PHILIP R. MONAHAN,
Attorney,
Department of Justice, Washington 25, D.C.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 25–33) is reported at 287 F. 2d 527.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1961 (Pet. App. 34). A petition for rehearing was denied on April 4, 1961 (Pet. App. 35–36). On April 28, 1961, Mr. Justice Black entered an order extending the time for filing a petition for a writ of certiorari to and including May 15, 1961, and the petition was filed on May 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was reversible error for the prosecuting attorney, without objection by the defense, to cross-examine a prosecution witness with respect to the witness's signed confession implicating the accused, when the witness, to the prosecutor's surprise, proved to be hostile and denied participation in the crime.

2. Whether it was reversible error for the trial judge, during the witness's cross-examination and without objection by the defense, to remind the witness, who had previously pleaded guilty to the crime which he was now denying having committed, that he was under oath and that he probably would be prosecuted for perjury if he testified falsely.

RULES INVOLVED

Rule 51, F.R. Crim. P., provides in pertinent part as follows:

> * * * [I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor * * *.

Rule 52(b), F.R. Crim. P., provides as follows:

> *Plain error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On April 18, 1958, an indictment (R. 2–3) was returned in the United States District Court for the

Western District of Louisiana charging petitioner and Thomas Polcyn with robbing a branch of the Commercial National Bank, in Shreveport, Louisiana, and putting in jeopardy the lives of four employees of the bank, in violation of 18 U.S.C. 2113 (a) and (d). Following a trial by jury, petitioner was found guilty[1] (R. 375) and sentenced to 25 years' imprisonment (R. 379, 380). The Court of Appeals for the Fifth Circuit affirmed (Pet. App. 25–33, 34).

1. The evidence adduced by the government may be summarized as follows:

On February 13, 1958, two men, both armed with pistols, held up the Youree Drive Branch of the Commercial National Bank in Shreveport, robbed it of approximately $34,500, and escaped in a car operated by a third man (R. 29–35, 41–45, 51–56, 64–70, 73–77, 85–86, 146–147). Petitioner was "positive[ly]" identified as one of the gunmen by five eyewitnesses to the crime—the assistant manager of the bank, three tellers, and a customer of the bank (R. 40, 50, 63, 68, 76).[2] Petitioner was also identified as one of the gun-

[1] Polcyn had pleaded guilty (R. 82).

[2] Each of the eyewitnesses got "a good look at" the man whom he or she identified as petitioner, and each was "certain" of his identity (R. 40, 44, 55, 68, 70, 71, 75–76). (Neither bandit wore a mask.) One of the bank employees, in testifying that he was "absolutely positive of [his] identification of Mr. Thomas," observed, "When a man points a gun in your face within three feet of you, you are not likely to forget him" (R. 40). Another employee testified that she had had a chance to observe the bandit whom she identified as petitioner "a good three or four minutes" before she was ordered to lie on the floor (R. 71) and that she was "absolutely certain" the man was petitioner (R. 69–70). Shortly after the robbery and prior to the trial, all five eyewitnesses also identified petitioner through photographs (R. 37–38, 40, 48, 50, 55, 68–69, 76–77).

men (R. 146–147) by his co-defendant Polcyn (the operator of the getaway car), who had pleaded guilty and testified for the government (R. 82, 141–174).

A month after the crime, on March 12, 1958, petitioner was questioned about the robbery by the Federal Bureau of Investigation in Fort Worth, Texas, where he was then living (R. 322–325). Following the interview, petitioner fled from the area and remained a fugitive until December 10, 1959, when F.B.I. agents discovered him living in Pelzer, South Carolina, under an assumed name (R. 175–177). Upon being identified through his fingerprints, he admitted his identity (R. 176). A pistol, corresponding in description with the gun which the eyewitnesses to the robbery saw in his hand during the hold-up, was found in the radio compartment of his car (R. 34–35, 44, 68, 76, 182–185, 195–196, 198–199). A suitcase packed with men's clothing and shaving equipment, the acknowledged purpose of which was to enable petitioner to be "immediately prepared for flight on all occasions," was found in the trunk of the car (R. 186, 201). Two hacksaw blades, for use "in making an escape if he was apprehended," were found taped to his right shin (R. 191–192, 193), and, in his left sock, beneath his foot, was $125 in five-dollar bills, which he admitted secreting there "for the same purpose" (R. 193).

Petitioner's defense consisted of testimony by a witness to an alleged alibi[3] (R. 210–230), by two character witnesses (R. 230–239, 240–252), and by

[3] There was only one alibi witness (other than petitioner himself), not two, as stated in the opinion of the court of appeals (Pet. App. 26).

petitioner himself denying guilt (R. 252–321). The alibi witness, who testified on direct examination that she had had lunch with petitioner in Fort Worth at 12:30 p.m. on February 13, 1958 (R. 211–212)—the exact time of the robbery (R. 32, 42)—admitted on cross-examination that she might have been mistaken as to the date of the luncheon (R. 219, 230).[4] One of the character witnesses acknowledged giving a revolver to petitioner a few weeks prior to the robbery, in partial discharge of a debt he owed him (R. 249–251). Petitioner, testifying in his own defense, explained his flight from Fort Worth as primarily motivated by fear of prosecution for income tax evasion (R. 274, 275–276, 310–311).[5] He acknowledged having a substantial criminal record (R. 253–254, 255, 282–291).

2. The facts on which the petition for a writ of certiorari is based are as follows:

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[4] Asked by the prosecutor whether it was not true that she did not know on "what date" she had seen petitioner, she replied, "I think that is true." In response to a question by the judge as to whether she was "sure" of the date of the luncheon, she said she was "pretty sure," but that "anyone can be mistaken" (R. 230). The witness's testimony was further shaken with respect to other matters (see, *e.g.*, R. 223–224, 226–227, 332–335).

[5] Petitioner testified that this fear was engendered by the fact that the F.B.I. agents who questioned him in Fort Worth, in March 1958, interrogated him about his income tax affairs (R. 274, 275–276, 302–303). F.B.I. agent Carter, who, in the presence of other agents, interviewed petitioner on the occasion in question, testified in rebuttal that the interrogation was concerned solely with the Shreveport bank robbery, and had nothing to do with tax matters (R. 322–324, 326).

Following the testimony of the five eyewitnesses to the robbery—four of whom had referred to the second gunman as a person named Angelly (R. 30, 32–34, 42–43, 55, 66–67)—Cecle Angelly, who had previously pleaded guilty to a separate indictment charging him with participation in the robbery (see R. 82), was called as a witness for the prosecution (R. 102). After he had stated his name, he was asked by the prosecutor (R. 102–103):

> Mr. Angelly, it has been the testimony of five eyewitnesses here that two robbers entered the Youree Drive Branch of the Commercial National Bank in Shreveport on February 13, 1958, and robbed that bank of better than $34,000. Did you participate in that robbery?

Angelly answered, "No, sir."

The prosecutor pleaded surprise and asked leave to "impeach the witness". Defense counsel then said: "Your Honor, I don't see how the district attorney can plead surprise when he has had this man locked up in the jail." The court asked the prosecutor to "[s]tate the circumstances of [his] surprise." (R. 103.) The prosecutor explained that, on the preceding Tuesday, Angelly "voluntarily told in detail the circumstances of the bank robbery" to him and other government representatives, implicating himself, petitioner, and Polcyn, and that, on the same occasion, the witness read a detailed written statement concerning the robbery which he had previously given and said that the statement was "entirely true" (R. 103–104).

The court, on the basis of the prosecutor's statement, granted the government leave to "attempt to

impeach" the witness's denial that he had participated in the robbery, at the same time cautioning the jury that "the statement made by" the prosecutor was not to be accepted by them as establishing the truth of the facts therein related, but that "each of the facts and circumstances therein state[d] must be proven independently by other evidence" (R. 104).

The court also reminded Angelly that he had previously pleaded guilty to "this charge of bank robbery" and warned him that he was "under oath" and would be "subject to prosecution for perjury" if he gave false testimony (R. 104–105).

The prosecutor then proceeded to cross-examine Angelly with respect to his written statement (R. 105–140). In response to questions by the prosecutor, Angelly denied that he had made the statement, saying it had been "furnished to [him]" by an F.B.I. agent (R. 106–107). He also denied that he had stated at the interview on the preceding Tuesday, referred to by the prosecutor, that the statement "set forth the true facts" (R. 105–106). He acknowledged, however, that he had signed the statement and that each page of it bore his initials (R. 107–109).

The prosecutor then asked the court for permission to "read this statement to the Court" (R. 109). The court directed the prosecutor to read the statement to the witness, sentence by sentence, and to ask him "whether or not he made the statement and whether or not it is true" (R. 109, 111). The prosecutor proceeded to do so. The written statement purported to be a detailed confession of complicity in the Shreveport robbery, in which Angelly implicated peti-

tioner and Polcyn as well as himself. With respect to virtually all of the individual statements in the document, including all that were material, Angelly denied making the statement and denied that it was true (see R. 109–135).

At the conclusion of the reading of the statement, the court asked the witness why he had pleaded guilty to the robbery if, as he now claimed, he was innocent (R. 135). Angelly replied that the Federal Bureau of Investigation had "put the statement to me and used threats if I didn't sign the statement" (R. 135). The following then occurred (R. 135–136):

> The COURT: When you were in court and entered your plea of guilty, didn't I ask you expressly whether or not anybody connected with the Government had in any way made promises or threats or otherwise brought any pressure against you to enter your plea of guilty? You remember that?
>
> The WITNESS: Yes, sir.
>
> The COURT: And you told me they had not done so?
>
> The WITNESS: Yes, sir.
>
> The COURT: You are now saying they did so?
>
> The WITNESS: Yes, sir.
>
> The COURT: It is pretty late to change your mind?
>
> The WITNESS: Yes, sir.
>
> The COURT: You still got all this time ahead of you?
>
> The WITNESS: Yes, sir.
>
> The COURT: You know the parole board is likely to consider what is going on here today?

The WITNESS: Yes, sir.

The COURT: And you are likely to be prosecuted for perjury?

The WITNESS: Yes, sir.

The COURT: You still insist on what you said?

The WITNESS: Yes, sir.

Aside from the statement by defense counsel (R. 103) that he did not "see how the district attorney can plead surprise when he has had this man locked up in the jail," which counsel made immediately following the prosecutor's plea of surprise at Angelly's initial denial of complicity in the robbery (*supra*, p. 6), the defense made no objection to any of the foregoing questions or proceedings.

ARGUMENT

1. Petitioner urges (Pet. 9–14) that the prosecuting attorney's examination of Angelly for the purpose of impeaching Angelly's surprise hostile testimony was without justification, and that the examination was highly prejudicial because it had the effect of allowing damaging hearsay evidence.

(*a*) In *Culwell* v. *United States*, 194 F. 2d 808, 811, the Fifth Circuit enunciated the basic rule concerning impeachment testimony: "[W]here there is a real surprise it is not proper to permit the impeachment testimony to go beyond the only purpose for which it is admissible, i.e., the removal of the damage the surprise has caused." Accord, *Young* v. *United States*, 97 F. 2d 200, 206 (C.A. 5); *Ward* v. *United States*, 96 F. 2d 189, 191–192 (C.A. 5); *Kuhn* v. *United States*, 24 F. 2d 910, 913 (C.A. 9), modified on other

grounds, 26 F. 2d 463, certiorari denied *sub nom. Lee* v. *United States*, 278 U.S. 605.

In the present case, Angelly's surprise testimony that he had not participated in the Shreveport robbery had a tendency to cast doubt on the testimony of four of the government's eyewitnesses to the effect that the second gunman, petitioner's accomplice in the hold-up, was a person by the name of Angelly (R. 30, 32–34, 42–43, 55, 66–67; see the Statement, *supra*, p. 6). Moreover, one of the eyewitnesses, in addition to referring to the second robber as a man named Angelly, testified that he had seen the man in the jury room that morning (R. 30). Hence, when Angelly, on being called by the government to testify, denied that he had taken part in the hold-up, his denial tended to reflect not only on the credibility of the government witnesses' testimony as to the participation of a person named Angelly, but upon their identification of petitioner as well. Consequently, under well settled principles, the government was entitled to claim surprise and seek to impeach the adverse testimony by confronting Angelly with prior contradictory statements.

Although there may have been some doubt as to what the scope of the impeachment should have been in order to remove the damage caused by the surprise testimony, the ultimate decision was one for the trial court to make in the light of all the circumstances, including the tactics of defense counsel (see *Ward* v. *United States, supra*, 96 F. 2d at 192). The trial court may have believed that petitioner's role as a participant was so integral a part of Angelly's own

participation in the robbery that effective impeachment of Angelly's denial of complicity would not be possible without permitting him to be questioned with respect to the portions of his confession in which he implicated petitioner. Moreover, defense counsel remained silent throughout the impeachment proceedings, neither making objection nor offering advice to the court as to how else the attempted impeachment could have fairly, yet effectively, been conducted. As we show below (pp. 12–13), there was strong reason for counsel's silence.

(*b*) Although the court of appeals assumed that Angelly's testimony had not damaged the prosecution's case and that therefore the impeachment had been unnecessary (Pet. App. 28),[6] it went on to hold that, under Rule 51, F.R. Crim. P., the failure of petitioner's trial counsel to object to the proceedings was fatal to a claim of reversible error.

Petitioner argues, however, that his trial counsel did adequately object (Pet. 10–11, 12), relying on counsel's remark made immediately following the prosecutor's plea of surprise, "Your Honor, I don't see how

[6] "Inasmuch as Angelly had made no statement from the witness stand hurtful to the Government's case at the time the United States Attorney was taken by surprise, the proper procedure, if objection had been made, would have been for the witness to have been withdrawn before he was permitted to give any further testimony."

The government does not appear to have brought to the attention of the court of appeals the fact that Angelly's surprise denial of his participation in the robbery tended to reflect on the credibility of the government's eyewitness testimony (see *supra*, p. 10).

the district attorney can plead surprise when he has had this man locked up in the jail" (R. 103; see the Statement, *supra*, p. 6). But, since this comment of counsel was, at most, an objection to the validity of the prosecutor's claim of surprise—a point which counsel did not further press at the trial, did not urge in the court of appeals, and does not now dispute—it plainly cannot now be made to do service as an objection to the impeachment procedure subsequently authorized by the court.

In the alternative, petitioner argues (Pet. 13–14) that the use made of the confession for purposes of impeachment was so prejudicial as to require the "error" to be noticed by the court as "plain error" under Rule 52, F.R. Crim. P. Although the outer limits of "plain error" for purposes of Rule 52 may be vague and undefined, the government submits that, in the present case, it was within the discretion of the court below to make the determination that those outer limits had not been reached. As the court noted, the admission of the evidence charged as error "was not an inadvertent or hard to notice event that might have slipped by the observation of court or counsel. Some 35 pages of printed record are taken up with questions and answers touching on this repudiated confession" (Pet. App. 30). For this reason, as the court further observed, reversal of the conviction on account of the occurrence now complained of would be justifiable only if "the appellate court felt it proper to substitute its judgment for that of trial counsel as to trial tactics" (*ibid.*).

Petitioner argues that this reasoning is based on "the wildest sort of speculation" (Pet. 13), but the

criticism fails to take account of the serious strategic predicament in which petitioner and his trial counsel found themselves at the time Angelly was called as a prosecution witness and gave his unexpected testimony denying that he had participated in the hold-up. Five eyewitnesses to the robbery had positively identified petitioner as one of the gunmen. In the light of this "clear and convincing proof * * * which overwhelmingly identified Thomas as the guilty person," the court of appeals noted (Pet. App. 30):

> [C]ounsel may well have considered that the only manner in which they could create reasonable doubt in the minds of the jury was by permitting the government to ask question after question of Angelly, touching on his purported complicity in the crime and having him deny categorically on each occasion that he knew anything about it.

Indeed, that such was the strategy is borne out by the closing arguments of defense counsel (R. 355):

> Then, Mr. Angelly was to come into court, I assume, and testify just the way he was supposed to for Mr. Wilson, but he sort of backfired on Mr. Wilson. I have no doubt Mr. Angelly has been threatened. He was a young fellow. The methods of the F.B.I. are efficient, members of the jury. They get results. They don't get results with kid gloves. They deal with some of the most hardened criminals in the United States and how is it they get results? They get them any way they can. In the case of Angelly, they used threats. * * *

2. Petitioner also contends (Pet. 14–18) that he was deprived of a fair trial because the trial judge

"threat[ened]" Angelly with "a perjury prosecution plus parole board retribution" (Pet. 14) if he continued to deny having made the confession which he had admittedly signed. Since petitioner was implicated in the confession, he maintains (Pet. 17) that the judge's "threats" "amount[ed] in the eyes of the jury to a demand for conviction."

The remarks of the judge to which petitioner refers are set forth in the Statement, *supra*, pp. 7, 8–9. In substance they amounted to little more than reminders to Angelly that he was under oath and that he would probably be prosecuted for perjury if he testified falsely. There was certainly every indication that Angelly, who had previously pleaded guilty to the crime which he now denied having committed, was blatantly perjuring himself. Under the circumstances, the judge had no obligation to remain silent (cf. *Quercia* v. *United States*, 289 U.S. 466, 469); his responsibility was to make sure that Angelly appreciated the gravity of his oath and the possible consequences of deliberate lying (cf. *Pasqua* v. *United States*, 146 F. 2d 522, 523 (C.A. 5), certiorari denied, 325 U.S. 855).

Moreover, as noted by the court of appeals (Pet. App. 30–31), petitioner in no way objected at the trial to the remarks now complained of, by motion for a mistrial, motion to strike, or otherwise. He was consequently precluded under Rule 51, F.R. Crim. P., from raising the point on appeal. He now attempts to excuse the failure to object on the ground that to have done so would have made it appear to the jury that there was "conflict" between his counsel

and the court (Pet. 12, 17). There was, however, no reason why counsel could not have made known his objection, if he had wished to object, and requested appropriate action, out of the hearing of the jury.

Finally, where, as here, the incidents complained of were not objected to at the trial and the record "fairly shrieks * * * guilt" (*Lutwak* v. *United States*, 344 U.S. 604, 619), the claim of prejudicial error noticeable under Rule 52 must, we submit, be rejected (see *supra*, pp. 12–13).

CONCLUSION

For the foregoing reasons no question requiring further review by this Court is presented; it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

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